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CAPITAL CASE
EXECUTION DATE: 21 Sept.

No. 95-6016
A-[illegible]

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LEM DAVIS TUGGLE,

Petitioner,

v.

J. D. NETHERLAND, WARDEN,

Respondent.

WARDEN'S REPLY

In his reply brief, petitioner relies upon Virginia Code § 19.2-169.7. According to Tuggle, under that statute nothing he said during the competency or sanity evaluation could be used against him. (Pet. Reply at 3).

Tuggle clearly misreads the statute. By its own language, the statute applies only to a defendant's "statement or disclosure...*concerning the alleged offense*." Va. Code § 19.2-169.7 (emphasis added) (copy appended). Although the record shows that Dr. Centor interviewed Tuggle, there is no evidence that Tuggle made any statements or disclosures about the alleged offense or, if he did, that the expert's opinion regarding "future dangerousness" was based upon such statements. In fact, Dr. Centor testified that his interview with Tuggle "related to his past history and various other matters." (Resp. App. 37).

Just as importantly, the statute says such statements cannot be used "at trial" unless the defendant put his mental state "at the time of the offense" in issue by filing a notice of an intent to raise an insanity defense pursuant to § 19.2-168. Clearly, then, what the statute contemplates

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is barring the use of a defendant's statements about the offense against him "at trial" on the issue of guilt. Indeed, that § 19.2-169.7 never was intended to apply to capital sentencing proceedings is evidenced not only by its title ("Disclosure by defendant during evaluation or treatment; use ***at guilt phase*** of trial") but by the fact that in 1986 -- two years *after* Tuggle's trial -- the Virginia Legislature enacted § 19.2-264.3:1G, which specifically governs the admissibility at capital sentencing proceedings of a defendant's statements made during a pretrial mental evaluation. Obviously, if § 19.2-169.7 meant what Tuggle says it does, the enactment of § 19.2-264.3:1G would have been unnecessary.

Respectfully submitted,

J. D. NETHERLAND, WARDEN

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, a copy of the foregoing Warden's Reply was faxed to the offices of Timothy M. Kaine, Mezullo and McCandlish, 1111 East Main Street, Suite 1500, Richmond, VA 23219, counsel for petitioner.

_____
Donald R. Curry
Senior Assistant Attorney General

§ 19.2-168. Notice to Commonwealth of intention to present evidence of insanity; continuance if notice not given. — In any case in which a person charged with a crime intends (i) to put in issue his sanity at the time of the crime charged and (ii) to present testimony of an expert to support his claim on this issue at his trial, he, or his counsel, shall give notice in writing to the attorney for the Commonwealth, at least twenty-one days prior to his trial, of his intention to present such evidence. In the event that such notice is not given, and the person proffers such evidence at his trial as a defense, then the court may in its discretion, either allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence. The period of any such continuance shall not be counted for speedy trial purposes under § 19.2-243. (Code 1950, § 19.1-227.1; 1970, c. 336; 1975, c. 495; 1986, c. 535.)

§ 19.2-169.7. Disclosure by defendant during evaluation or treatment; use at guilt phase of trial. — No statement or disclosure by the defendant concerning the alleged offense made during a competency evaluation ordered pursuant to § 19.2-169.1, a mental state at the time of the offense evaluation ordered pursuant to § 19.2-169.5, or treatment ordered pursuant to § 19.2-169.2 or § 19.2-169.6 may be used against the defendant at trial as evidence or as a basis for such evidence, except on the issue of his mental condition at the time of the offense after he raises the issue pursuant to § 19.2-168. (1982, c. 653.)

§ 19.2-264.3:1. Expert assistance when defendant's mental condition relevant to capital sentencing.

* * *

G. *Disclosure by defendant during evaluation or treatment; use at capital sentencing proceedings.* — No statement or disclosure by the defendant made during a competency evaluation performed pursuant to § 19.2-169.1, an evaluation performed pursuant to § 19.2-169.5 to determine sanity at the time of the offense, treatment provided pursuant to § 19.2-169.2 or § 19.2-169.6 or a capital sentencing evaluation performed pursuant to this section, and no evidence derived from any such statements or disclosures may be introduced against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances specified in § 19.2-264.4. Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense (1986, c. 535; 1987, c. 439.)